IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,

Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC., and ROBERT E. MALONE,

Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' SUPPLEMENTAL REPLY BRIEF TO BRIEF *AMICUS CURIAE* FILED BY THE SOLICITOR GENERAL OF THE UNITED STATES

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York

CITATIONS

	PAGE
Amazon Cotton Mill Co. v. Textile Workers Union, 167 F.2d 183	10
Beasley v. Food Fair, —— U.S. ——, 94 S. Ct. 2023	7
Cunard S.S. Co. v. Mellon, 262 U.S. 124	14
Garner v. Teamsters, etc., 346 U.S. 485	10
Grain Elevator Workers Local 418 v. NLRB, 376 F.2d 774, cert. den. 389 U.S. 932	5
Hanna Mining Co. v. District 2 MEBA, 382 U.S. 181	6, 7, 8
Hattiesburg Bldg. & Trades Council v. Broome, 377 U.S. 126	4, 5
Lauritzen v. Larson, 345 U.S. 571	11
Local Union No. 25 v. New York, New Haven & H. R. Co., 350 U.S. 155	5
Madden v. Grain Elevator Workers Local 418, 334 F.2d 1014, cert. den. 379 U.S. 967	5
McCulloch v. Sociedad Nationale de Marineros de Honduras, 372 U.S. 10	12n
Motor Coach Employees v. Lockridge, 403 U.S. 274	5, 7
NLRB v. International Longshoremen's Association, 332 F.2d 992 (4 Cir.)	5
NLRB v. San Francisco Labor Council, 475 F.2d 1125	5
Paraiso v. U. S., 207 U.S. 368	2n
Plumbers, etc. Local 298 v. County of Door, 359 U.S. 354	5
San Diego Building Trades Council v. Garmon, 359 U.S. 236	5, 6, 7, 8
Steelworkers v. NLRB, 376 U.S. 492	9
Teamsters Union v. Morton, 377 U.S. 252	8, 9
Wilderhaus' Case, 120 U.S. 1	14
Windward Shipping (London) Ltd. v. American Radio Assn. *et al.*, —— U.S. ——, 94 S. Ct. 959	1, 2, 6, 8, 11, 12n

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-748

AMERICAN RADIO ASSOCIATION, AFL-CIO, et al.,
Petitioners,

v.

MOBILE STEAMSHIP ASSOCIATION, INC.,
and ROBERT E. MALONE,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

PETITIONERS' SUPPLEMENTAL REPLY BRIEF TO BRIEF *AMICUS CURIAE* FILED BY THE SOLICITOR GENERAL OF THE UNITED STATES

In this case, as in *Windward* v. *American Radio Assn.*, —— U.S. ——, 94 S. Ct. 959, the United States, without prior notice, and without even seeking the Court's leave, has filed a brief *amicus curiae*, so far out of time that it is necessary for us to impose on the Court by filing a supplemental brief to reduce the Government's unfair advantage.[1]

1. In *Windward* the Government filed its memorandum supporting the petitioner foreign flag ship 105 days out of time and six days before oral argument. Here its brief supporting the respondents longshoring association and farmer, is filed 54 days out of time and approximately two weeks prior to argument. While in *Windward* the Court declined to act on the Union's motion to strike the Government's brief, in light of the fact that such late filings are now apparently routine rather than exceptional, we believe it appropriate to move once again that the Government's untimely brief be stricken.

1. The premise upon which the Government rests its argument is that "[e]xcept in one important respect—the character of the complaining party—this case is identical to *Windward supra*" (Gov. Br. p. 2); and the proffered conclusion drawn from that premise is that while "in our case, those who sought the injunction were neutral American employers, not foreign shipowners as in *Windward* * * * it is not apparent how the character of the state court plaintiff can bring within the ambit of the Labor Relations Act activity which has been held outside it" (Gov. Br. p. 6).

We had thought that no law student passed the first year without learning that out of a single factual matrix a number of causes of action may arise, some meritorious and others not, and some within the jurisdiction of a particular tribunal and others outside that court's reach. And, we are certain that only an "intelligence fired with a desire to pervert"[2] could have misinterpreted our brief to assert that it is "the character of the state court plaintiff" (Gov. Br. p. 6) rather than as was actually argued, the gravamen of the complainant's cause of action and the state court's rationale, that requires the conclusion that this case is within the exclusive primary jurisdiction of the NLRB.

(a) In *Windward,* foreign flag shipowners filed a state court action "asking the court to enjoin the picketing [there] as tortious under Texas law. The primary basis for [the ships'] claim was that the picketing sought to induce the owners and crews to break pre-existing contracts" (94 S.Ct. at 962). This Court held that the NLRA as amended did not deprive the state court of jurisdiction to decide that claim since the Act is "unrelated to maritime

2. *Paraiso* v. *U. S.*, 207 U.S. 368, 372 (Holmes, J.).

commerce and directed solely at American labor relations" (*id.* at 964).

As the Government says, the instant case also "involve[s] picketing of a foreign vessel by American unions, calling attention to the adverse consequence for domestic seamen of the lower wages paid foreign seamen, and asking all those in a position to do so to boycott the foreign vessel" (Gov. Br. p. 5). But here, in contrast to *Windward,* the claim made was *not* that the picketing sought to induce the "[foreign flag] owners and [foreign] crews to break pre-existing contracts" (*cf.*, 94 S.Ct. at 962). The injunction framed by and granted to the American stevedoring companies that are members of the Association regulates the Association's employer-employee relationship with its American employees rather than the employer-employee relationship between a foreign flag ship and its crew. (App. pp. 29a-30a.) Thus, the Supreme Court of Alabama did not purport to define the comparative rights of the picketed foreign flag ship, which is not even a party to this cause, and the Unions. In other words, this lawsuit and the resulting injunction are "directed solely at American labor relations" (*cf.*, 94 S.Ct. at 964).

Thus, the point which the Government argues is pivotal—that the Union's underlying dispute was with a foreign flag shipowner—was not even addressed on the merits by the Alabama courts. Instead, the Alabama courts proceeded to resolve the only controversy before them—the discrete dispute between the Association on the one hand and the the Association's employees and the Unions on the other, all of whom are Americans—just as it would have resolved such a dispute between those parties if the picketed ship, too, had been American.

(b) If the picketed ship had been American there could be no doubt that the Alabama courts had no jurisdiction to issue the injunction that was issued here. That would be true even if the picketed American flag ship was not "in commerce" for purposes of the NLRA because, for example, it did not do enough business to meet the Board's jurisdictional standards. That is the lesson of *Hattiesburg Bldg. & Trades Council* v. *Broome*, 377 U.S. 126 where this Court stated:

> "After finding that the primary employer was not in commerce and ruling that the pre-emption rule of San Diego Building Trades Council v. Garmon, 359 U.S. 236, was therefore not applicable, the state court enjoined picketing at the premises of the secondary employer. The judgment must be reversed. The jurisdictional standards established by the National Labor Relations Board (see 23 NLRB Ann Rep 8 (1958) may be satisfied by reference to the business operations of either the primary or the secondary employer. Truck Drivers Local No. 649, 93 NLRB 386; Teamsters Local No. 554, 110 NLRB 1769; Madison Bldg. & Const. Trades Council, 134 NLRB 517. Here, as the record clearly shows, the secondary employer's operations met the jurisdictional requirements. Since the union's activities in this case were arguably an unfair labor practice, Sailors' Union of the Pacific, 92 NLRB 547, the state court had no jurisdiction to issue the injunction. San Diego Building Trades Council v. Garmon, 359 U.S. 236; Construction Laborers v. Curry, 371 U.S. 542. Accordingly, the petition for certiorari is granted and the judgment is reversed." (*Id.* at 126-127.)

The present case with its allegations of conduct within §8(b)(4)'s purview and involving American employers and unions, is but another example of the Congressional scheme

of the NLRA's exclusive jurisdiction over the alleged misconduct, notwithstanding the underlying, primary or causative dispute, is without the Act's scope; e.g., where the primary or causative dispute involved foreign flag shipowners, *NLRB* v. *International Longshoremen's Association,* 332 F.2d 992, 995 (4 Cir.); *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7 Cir.); *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.); and where the primary or causative dispute involved a railroad, *Local Union No. 25* v. *New York, New Haven & H.R. Co.,* 350 U.S. 155; and where the primary or causative dispute involved a governmental entity, *Plumbers, etc. Local 298* v. *County of Door,* 359 U.S. 354; and where the primary or causative dispute involved an agricultural enterprise, *NLRB* v. *San Francisco Labor Council,* 475 F.2d 1125 (9 Cir.) enforcing 191 NLRB 261.

Pursuing the Solicitor General's unusual argument, that because the underlying dispute is not within the NLRB's exclusive province and therefore, all effects of the dispute inclusive of secondary effects are within the jurisdictional competence of state courts, would not only legislatively repeal the Congressional scheme embodied in the Act, it would equally reverse each of the foregoing authoritative holdings and their manifold progeny.

And, while, since the *Broome* decision questions have been raised in the Court as to the application of the doctrine of *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236, "to conduct arguably *protected* under §7" and not arguably prohibited by §8 (*Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 325-328; White, J., dissenting; emphasis added), there has been no disagreement since

Garmon, that *Garmon* correctly states Congress' intent insofar as it holds that a complaint seeking injunctive relief which in substance charges a union with an arguable violation of §8 of the NLRA, and which does not rest either on an alleged breach of a collective agreement or on violence by the union, is within the exclusive primary jurisdiction of the NLRB. Indeed, that holding has repeatedly been unanimously followed. And the instant case, of course, falls within that holding since the complaints herein, in essence, plainly allege a secondary boycott arguably prohibited by §8(b)(4).

(c) To be sure, the conclusion that the Alabama courts do not have jurisdiction to apply state law to the secondary boycott claim made by the Association does not, as we have recognized throughout, lead to the further conclusion that the Alabama courts do not have jurisdiction to apply state law to a claim filed by a true foreign-flag ship,[3] that "the picketing sought to induce (foreign) owners and (foreign) crews to break pre-existing contracts" and on that basis is "tortious under [Alabama] law" (*Windward*, 94 S.Ct. at 963), simply because the Union against whom the state court suit is brought argues that its picketing is also a violation of §8(b)(4).

In *Hanna Mining Co.* v. *District 2 MEBA*, 382 U.S. 181, 192-94, this Court affirmed state court jurisdiction over a suit brought by *Hanna* that "alleged that MEBA was picketing Hanna's vessels * * * with the * * * improper aim * * * under Wisconsin law * * * of forcing its representation on unwilling engineers" (id. at 187) and rejected, inter

3. Cf. Un. Br. p. 18, fn. 5.

alia, MEBA's argument that the suit was preempted because the picketing "exerted secondary pressure, arguably violating §8(b)(4)(B)" (id. at 191). As Mr. Justice Harlan, who also wrote the *Lockridge* opinion which reaffirmed *Garmon* there recognized, the *Garmon* doctrine does not divest the state courts of their jurisdiction over claims that picketing that is not even arguably protected by federal law, is tortious under state law, merely because the union raises such a defense. In other words, the states do have jurisdiction to enforce state laws directed to employer-employee relationships not regulated by federal law even though the particular conduct in question may have secondary consequences on employer-employee relationships that are governed by the NLRA. For, extension of *Garmon* to such case would frustrate the state in enforcing its law since the state court would thereby be deprived of jurisdiction, and since the Board could not "reach the volatile core of the conduct"—viz., in *Hanna* the primary picketing prohibited by state law (see 382 U.S. at 194).

The eminently sensible result reached in *Hanna* was "not [a] retreat from *Garmon.*" 382 U.S. at 194. (See also *Lockridge,* 403 U.S. 274). The Government seeks to transform it into one by its mental gymnastics unsupported by authority. *Hanna* does not support the Government's novel construct. As we have just seen, the complaint there was predicated on the unprotected primary picketing's illegality under state law, and was therefore outside the Board's competence. That is the reason that complaint had to be dealt with in state court or not at all. And the fact that the focus there was on the employer-supervisor relationship not regulated at all by the NLRA (see also *Beasley* v. *Food Fair,* —— U.S. ——, 94 S.Ct. 2023) assured

that "there was wholly absent the greatest threat against which the *Garmon* doctrine guards, a State's prohibition of activity that the Act indicates must remain unhampered." (382 U.S. at 194.) In both of these critical respects *Windward* was identical to *Hanna*.

But here the complaint is simply that the unions were guilty of a secondary boycott against American employers. That is the type of claim that Congress has dealt with "comprehensively, and with great particularity [has] 'describe[d] and condemn[ed] specific union conduct directed to specific objectives,' " but not others, and, as to which, Congress has determined that those who enjoy the protection of §8(b)(4) are both limited to the recovery of actual damages, and to securing injunctive relief through the NLRB. (*Teamsters Union* v. *Morton*, 377 U.S. 252, 258-261.) Thus, there can be no doubt that if the Association is remitted to the exclusive authority of the Board, that agency has the power "to reach the volatile core of the conduct" (*Hanna*, 382 U.S. at 194) and to afford the complaining party the full relief Congress has decreed. Moreover, because the focus of this case is on an employer-employee relationship (that between the Association and its longshoremen employees) regulated in its entirety by the NLRA, here, as opposed to *Hanna* and *Windward* the "greatest threat against which the *Garmon* doctrine guards, the State's prohibition of conduct that the Act indicates must remain unhampered" is not "wholely absent," it is clearly present. The injunction issued in this case does not simply govern picketing against foreign flag ships, it prohibits,

> all picketing "at or near [the Association] premises"; "any interfer[ence] by words or actions [with]

> any person or persons working for [the Association]"; "interfering with the operations of [the Association] in any manner"; "picketing directed at vessels with whom [the Association has] contractual relations"; and "interfering with the contractual relations existing or to exist between [the Association] and * * * vessels calling at the Port of Mobile.",

even though the Act protects such interferences where they are simply the outgrowth of primary disputes with domestic employers. (See, e.g. *Steelworkers* v. *NLRB* (*Carrier Corp.*), 376 U.S. 492.)

In short, the Government is entirely wrong when it argues, relying on *Hanna*:

> "Since the Labor Board has no jurisdiction over the primary dispute, the Board's only concern is to provide neutral parties with the protection of Section 8(b)(4)(B). The Board need not have exclusive jurisdiction in order to do so. Neutral parties should therefore be free to take advantage of Section 8(b)(4)(B), or to seek injunctive relief in state court." (Gov. Br. p. 11.)

Section 8(b)(4) does not merely state a prohibition, it delineates a careful compromise between the interests of unions, neutral employers, and the latter's employees. (See, e.g. *Carrier*, 376 U.S. 496; *Morton*, 377 U.S. 252.) The Board's "only concern is [not] to provide neutral parties with the protection of Section 8(b)(4)(B)," it is to protect the interests of all three in accord with Congress' commands. "The Board [must] have exclusive jurisdiction in order to do so." (cf. Gov. Br. p. 11.)

2. While the Solicitor General denominated his proposal as one granting concurrent jurisdiction (Gov. Br. p.

9), it is much more than that. It would grant to state courts separate and equal and independent jurisdiction to determine under state law, without regard to prior or later determinations by the Board,[4] labor disputes which the Solicitor General acknowledges are now within the exclusive domain of the Board. They are now within that exclusive domain not because of any judicial "accommodation", not because preemption is a judicial invention, but because Congress so intended by Section 10(a) of the NLRA, *Garner* v. *Teamsters, etc.*, 346 U.S. 485; *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F.2d 183, 187.

Furthermore, the Norris-LaGuardia Act, 29 U.S.C. §§101-115, with its general proscription of federal judicial authority to issue injunctions in labor disputes to private parties, would be brazenly frustrated by the substitution of the Solictor General's proposed concurrent jurisdiction to state courts by enabling the latter to issue such injunctions to private parties over the same conduct and its regulation which by Sections 10(a), (e), (f), (j-m) of the Act, Congress by its scheme made enforceable only in federal courts.

Additionally, the specific delineated Congressional scheme embodied in the proviso[5] to the Act's Section 10(a)

4. Under the Solicitor General's proposal, decisions of this Court determining certain labor conduct to be protected by the Act, would be undermined by possible state court decisions applying state law to the same conduct, and which determination would not be further reviewed, there being no federal question involved, merely state law.

5. "Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

of not ceding to state authorities the NLRB's jurisdiction, unless such state authorities' laws and their application, are not inconsistent respectively with the Act and the NLRB, would be patently violated by the Solicitor General's proposals containing no requirement as to consistency of the state bodies' laws and their application.

The Solicitor General's conduct here, brings into focus and equally applicable, Mr. Justice Rehnquist's reference in *Windward* to this Court's *Lauritzen* v. *Larson*, 345 U.S. 571, direction that,

> "* * * this Court rejected a 'candid and brash appeal' made by the seamen and various *amici* that the Court should 'extend the law to this situation as a means of benefiting seamen and enhancing the cost of foreign ship operation for the competitive advantage of our own.' 345 U.S. at 592. We observed at that time that such arguments were obviously better directed to Congress." 94 S.Ct. at 964, fn. 13.

Similarly, the Solicitor General should direct his "candid and brash appeal", his proposals, to Congress, not this Court.

3. The Solicitor General's argument for his proposed most drastic amendments of the NLRA is premised fundamentally upon a subjective and unsupported appeal over concern for the Nation's economy, trade, water-borne delivery of petroleum products and relations with foreign countries (Gov. Br. pp. 2, 12). Significantly, nothing in the record of this case or factual documentation in the Solicitor General's brief supports such concerns, other than the subjective orations. Candid, but nevertheless brash appeals

for amending the NLRA should better be directed to the proper body, Congress, rather than to this Court.[6]

Petitioners' appeal, directed to the public, truthfully and openly proclaimed the substandard conditions of the picketed foreign ship owners' vessels transporting American sea-borne commerce and the dire consequences to the American merchant seamen's domestic employment opportunities with the appeal: "Please do not patronize these vessels. Help the American seaman" (6a), and concurrently—"Please Patronize American Flag Vessels, Save Our Jobs, Help Our Economy And Support Our National Defense By Helping To Create A Strong American Merchant Marine" (7a). Such request for non-patronization of the foreign flag owners' vessels and preferential use of American flag vessels constitutes the basis for the Solicitor General's expressed subjective concerns regarding adverse impact upon our economy, trade and relations with foreign countries. However, most critical is the fact that such concerns and the alleged dire consequences have most recently been expressed to Congress, the proper forum, by the Solicitor General's client, the State Department, with respect to legislation establishing cargo preference for American vessels with American seamen, an objective and purpose comparable to petitioners' picketing. And, most significant, such expressed concerns were not found meritorious but on the contrary, were apparently rejected by Congress, as witness its action on the legislation.

Two bills entitled, "Energy Transportation Security Act of 1974," S. 2089 and H.R. 8193 require that up to

6. *Windward*, 94 S. Ct. at 964 fn. 13; *McCulloch* v. *Sociedad Nationale de Marineros de Honduras*, 372 U.S. 10, 22.

30% of all United States oil imports be carried on United States flag vessels. Extensive hearings were held in 1974 concerning this proposed cargo preference act.[7] The State Department's representatives, both in writing and in person, opposed its enactment, expressing their concerns that the legislation would have, "serious adverse foreign, economic and domestic consequences which would result from the enactment of the cargo preference legislation";[8] "* * * the adverse repercussions * * * on our international relations" and "* * * adversely affect our national security."[9] That the national economy would be adversely affected.[10] And finally, such legislation would cause foreign retaliation and exacerbate substantial foreign relations and possibly contravene treaty relations.[11]

Notwithstanding the State Department's presentation, which almost without exception, tracks the Solicitor General's expressed concerns here, both Houses rejected such argument by their overwhelming votes of 266 to 136 in the House and 42 to 28 in the Senate in favor of the bills. As of this writing, House and Senate conferees have concluded the resolution of differences in their bills, and the House has adopted the conferees' report, with Senate action upon such report awaiting the Senate's return from its recess. Most significant is the undisputed fact that the fears ex-

7. Energy Transportation Security Act of 1974; Hearings Before the Sub-Committee on Merchant Marine of the Committee on Commerce, United States Senate, Ninety-Third Congress, Second Session on S. 2089 and H.R. 8193, Serial No. 93-81, U.S. Government Printing Office. For Hearings in the House of Representatives on H.R. 8193 see Un. Br. p. 18, fn. 5.

8. Senate Hearings p. 13.

9. *Ibid.* p. 13.

10. House Hearings p. 149.

11. *Ibid.* pp. 150, 151.

pressed by the Solicitor General have been recognized by the State Department as matters exclusively the concern of Congress and not the courts, as witness that Department's extensive representations and testimony before Congress. Equally significant, is that the State Department, having been unsuccessful in its efforts before the legislative branch, is now apparently engaged in forum shopping in the hope that this Court will accord their concerns a more hospitable reception than was accorded them by Congress.

Finally, the Solicitor General's reliance upon Republic of Liberia's brief *amicus* as an example of the effect of the domestic dispute upon Liberian registered vessels (Gov. Br. p. 12), is demonstrably superficial when contrasted to realty. The brief *amicus* of that nation is devoted to the frivolous argument that petitioners' acts violate a treaty. (*Wilderhus' Case,* 120 U.S. 1; *Cunard S.S. Co.* v. *Mellon,* 262 U.S. 124.)

As demonstrated by the hearings on the above oil cargo preference bill,[12] Liberia has, for token payment, afforded American owned major petroleum and multinational corporations, its flag as a refuge. It is undisputed that such vessels, with Liberian agreement and consent,[13] are constructively American vessels,[14] although they comprise a major portion of the Liberian registered vessels.[15]

12. Un. Br. p. 18, fn. 5.

13. Senate Hearings, *ibid.* pp. 25, 26.

14. fn. 12 *supra.*

15. Some of the major American owned petroleum companies and American owned multinational companies are: Alcoa Steamship Company, Inc., American International Oil Company, Atlantic Richfield Company, Bethlehem Steel Corporation, Chevron Shipping Company, Cities Service Tankers Corp., Exxon Corp., Getty Oil Company, Gotaas-Larsen, Inc., Gulf Oil Corporation, Marine Transport Lines, Inc., Mobil Oil Company, National Bulk Carriers, Inc., Phillips Petroleum Compay, Texaco, Inc. and Union Oil Company of California (House Hearings, *ibid.* p. 606).

It distorts reason, logic and experience to conclude that a domestic dispute as alleged by respondents, to wit, that petitioners' pickets interfered with American stevedoring business and operations, may adversely affect relations with Liberia because of the alleged effect of such dispute upon American citizens owned and constructively American vessels under effective American control, which are incidentally registered in Liberia. Controlling, however, is the fact that this concern for the protection of such "relations," has been presented to and rejected by Congress.

Conclusion

The Solicitor General's brief should be stricken. In any event, the Court below was in error in concluding that it was not preempted by the NLRA from entertaining the issues.

Respectfully submittted,

HOWARD SCHULMAN
Attorney for Petitioners
Empire State Building
350 Fifth Avenue
New York, New York 10001

Of Counsel:
SCHULMAN, ABARBANEL & SCHLESINGER
New York, New York